SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 872

THE STATE OF GEORGIA
Appellant

V.

HIRAM W. EVANS
JOHN W. GREER, JR.
THE AMERICAN BITUMULS COMPANY
THE SHELL OIL COMPANY, INC.
EMULSIFIED ASPHALT REFINING CO.
Appellees

BRIEF FOR APPELLANT

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WILLIAMS PTG. CO.-ATLANTA

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BRIEF ON BEHALF OF APPELLANTS

REFERENCE TO REPORT OF OPINIONS IN COURTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed in 123 Fed. 2nd, 57. (Advance sheet No. 1, December 8th, 1941.)

STATEMENT OF JURISDICTION

(1) This court has jurisdiction to decide the questions herein involved by virtue of Judicial Code,

Section 240, as amended by the Act of February 13th, 1925, 43 Statutes 938, 28 U. S. C. Section 347 (a).

(2) This court granted the writ of certiorari on March 2nd, 1942.

STATEMENT OF THE CASE

The appellant brought a civil action in the District Court of the United States for the Northern District of Georgia, Atlanta Division, seeking a judgment against appellees in the principal amount of $384,-081.39. The allegations of the complaint, briefly summarized, were as follows: Appellees entered into a combination or conspiracy having for its purpose the restraint of trade in emulsified asphalt shipped in interstate commerce into the State of Georgia, and the control of prices and the elimination and suppression of competition in respect to such commodity among the appellees and between the appellees and their competitors and prospective competitors. In pursuance of such conspiracy, appellees monopolized and attempted to monopolize trade in respect to such commodity. Appellee Hiram W. Evans, personally, or in behalf of the Southeastern Construction Company, a partnership organized by Evans, entered into an agreement and conspiracy with each of the corporate appellees, who were engaged in the business of manufacturing emulsified asphalt outside of the State of Georgia, and selling the same within the State of Georgia, the asphalt moving into the State in interstate commerce, (their business constituting more than 90% of all emulsified asphalt sold in the State of

Georgia), the terms of the agreement and conspiracy being that all sales in the State of Georgia of emulsified asphalt manufactured by said companies were to be handled by Evans. Each company was to submit bids to the State Highway Department of Georgia at prices directed by Evans, who was to receive a commission or other compensation on each sale. The appellees, together with divers other persons, caused the specifications and standards of emulsified asphalt to be purchased by the State Highway Department to be changed so that only the emulsified asphalt manufactured by the appellee companies and handled and sold by Evans would be acceptable. Appellee John W. Greer, Jr., acting in his capacity as purchasing agent for the State Highway Department, and in conspiracy with Evans, and in furtherance of the combination and conspiracy between appellees, notified the other appellees of the change in specifications and refused to so notify competitors and prospective competitors of the appellees. During the period covered by the complaint, after the notice of change in specifications, Greer notified the appellees of the proposed purchases of emulsified asphalt by the State Highway Department and refused to notify competitors and prospective competitors of the appellees, rejecting all bids submitted or attempted to be submitted by competitors or prospective competitors of the appellees, whether such bids were lower than the bids submitted by the appellees or not. When, as a result of an invitation to bid, submitted by a subordinate of Greer to another manufacturer, without Greer's knowledge or consent, such manufacturer submitted a bid lower than those submitted by the

appellees, and efforts to cancel this invitation had proved futile, Greer, acting in collusion with Evans and in furtherance of the conspiracy between appellees, divided large orders of emulsified asphalt into numerous small orders of less than $500.00 each for the purpose of awarding the small orders to Evans without receiving the competitive bids required by law and by custom upon orders in excess of $500.00, the smaller orders being awarded at a price fixed and agreed upon by the appellees.

As a result of the conspiracy of appellees and their actions in pursuance thereof, the appellant was injured and damaged in its property in the actual amount of $128,026.95.

The complaint was brought in two counts, the first alleging a violation of the Act of July 2, 1890, Ch. 647, Sec. 1; 26 Stat. 209; U. S. C. Title 15, Sec. 1; the second alleging a violation of the Act of July 2, 1890, Ch. 647, Sec. 2; 26 Stat. 209; U. S. C. Title 15, Sec. 2. (Printed record, pp. 1-26.)

Upon separate motions, the respondents sought to have the complaint dismissed on the ground that the State of Georgia was not a "person" upon whom a right of action for treble damages was conferred by Section 7 of the Act of July 2nd, 1890, or Section 4 of the Act of October 15th, 1914. (R. 27-34.)

The District Court sustained the motions to dismiss and on July 31st, 1941, entered separate judgments dismissing the complaint against each of the respondents. (R. 34.)

An appeal was prosecuted to the Circuit Court of Appeals and on October 30th, 1941, that court

entered a judgment affirming the judgment of the District Court. (R. 42; 123 Fed. 2nd, 57.)

The petition for rehearing was filed November 17th, 1941. (R. 43.) Was entertained and was denied December 15th, 1941. (R. 47.) The mandate was stayed. (R. 49.)

THE QUESTION PRESENTED

Whether the State of Georgia when it has been injured in its property by reason of a violation of Sections 1 and 2 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. 1 and 2, may maintain a civil action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 731, 15 U. S. C. 15.

STATUTES INVOLVED

Section 7 of the Act of July 2, 1890, Ch. 647, 26 Stat., 209, 210, provides:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 of the Act of July 2, 1890, Ch. 647, 26 Stat. 210, 15 U. S. C. 7 provides.

> "That the word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations existing under or

authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15, provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 1 of the Act of October 15, 1914, Chapter 323, 38 Stat. 730, provides in part:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that 'Anti-trust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890: * * *."

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In affirming the judgment of the District Court.

(2) In holding that the case was controlled by the decision of the Supreme Court in *United States v. Cooper Corp.*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667.

(3) In applying the reasoning of the court and the conclusion reached in the case of *United States v. Cooper Corp.*, 312 U. S. 60, 61 Sup. Ct. 742, 85 L. Ed. 667, to a case in which a State and not the United States seeks to maintain an action for treble damages under Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

(4) In failing to hold that when it has suffered injury to its property by reason of a violation of Sections 1 and 2 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 15 U. S. C. 1 and 2, the State of Georgia is a "person" for the purpose of determining whether it may maintain an action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

(5) In construing the word "person" in that portion of Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, affording a right of action for treble damages to "any person" as excluding the State of Georgia.

(6) In failing to hold that a State is entitled to maintain an action for treble damages under Section 7 of the Act of July 2, 1890, and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

ARGUMENT AND CITATION OF AUTHORITIES

I.

The word "person" as used in the statute includes the State as a sovereign.

1. *U. S. vs. Cooper Corp.* is not binding as a precedent.

After the State of Georgia filed its complaint, but before the issues raised by the motions to dismiss were heard, the Supreme Court decided the case of U. S. vs. Cooper Corporation, 61 Sup. Ct. (Advance Sheets) 742, in which it was held, by a four to three decision, that the United States was not a "person" within the meaning of Section 7 of the Sherman Act authorizing the action for treble damages. The district court considered itself bound by the reasoning as well as by the result of the Cooper case, and applying this reasoning to the facts of the instant case, sustained the motions to dismiss.* In this the court erred. Likewise, upon appeal the Circuit Court also felt itself so bound, and affirmed the judgment of the District Court dismissing the complaint.

It is unnecessary to here discuss the many and fundamental differences between the United States and the sovereign states. It is sufficient for the purposes of this argument to say that under the facts before the court in the Cooper case, the United States Government sought to maintain the action. The arguments used in stating the opinion of the court must be referred to the subject before it and construed in connection with the question to be decided.

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*"The reasoning in this decision is equally applicable to this case where the State of Georgia is plaintiff, and under authority of this case, which of course is controlling here, IT IS ORDERED AND ADJUDGED that said motion be, and same hereby is sustained and said action against this movant dismissed." (Printed Record p. 34).

Moorewood vs. Enequist
64 U. S. 491, 16 L. ed. 516.

Where the specific question does not appear to have been raised the court does not consider itself bound by the view expressed in the earlier case.

Cross vs. Burke
146 U. S. 82, 36 L. ed. 896.

A prior case decided by a closely divided court is authority only for its own facts.

U. S. vs. Kennesaw Mountain Battlefield Association
99 Fed. 2nd 830.

Any language used by the court in the Cooper case which might be construed to include a case in which a State files a complaint under Sec. 7 of the Sherman Act is obiter dictum, and while it may be respected, ought not to control a subsequent action in which the very point is presented for decision.

Wright vs. U. S.
302 U. S. 583; 82 L. ed. 439.*
Williams vs. U. S.
289 U. S. 553, 77 L. ed. 1372.
Humphries Exec. vs. U. S.
295 U. S. 602, 79 L. ed. 1611.
Baltimore and Carolina Line vs. Redman

*"Any observations which could be regarded as having a bearing upon the question now before us would be taken out of their proper relation. The oft repeated admonition of Chief Justice Marshall: 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used,' and that if they go 'beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision,' has special force in this instance. Cohen vs. Va., 6 Wheat. 264, 399, 5 L. ed. 257, 290."

295 U. S. 654, 79 L. ed. 1636.
O'Donoghue vs. U. S.
289 U. S. 516, 77 L. ed. 1356.

The rule of stare decisis itself breaks down when there is an important question involved which has been previously decided by a closely divided court, and especially when adherence to the previous rule involves collision with prior well established doctrines.

West Coast Hotel Company vs. Parrish
300 U. S. 379, 71 L. ed. 703.
Helvering vs. Hallock
309 U. S. 106, 84 L. ed. 604.*

As pointed out in

Reflectolyte Company vs. Luminous Unit Company
20 Fed. 2nd 607,

"One ought not to be cut off under that rule until his rights have been fully adjudicated."

For these reasons the appellant has no hesitancy in questioning the reasoning of the majority justices in the Cooper case, although it is not necessary to determine whether the final result reached in that case was correct or incorrect. If the reasoning is unsound, it should not be applied to a case in which the State and not the United States is seeking to recover treble damages under Section 7 of the Sherman Act.

*Mr. Justice Frankfurter said: "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satify reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

2. The statute is remedial.

Section 7 of the Sherman Act provides that:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor . . . and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 (15 U. S. C. A. 7) provides:

"The word 'person', or 'persons', whenever used in Sections 1, 2, 3, or 15 of this chapter, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country."

In seeking to determine whether it was the intent of Congress to exclude a State from the designation, "any person" as used in Section 7 of the Sherman Act, it must first be borne in mind that this section is not a penal, but is a remedial provision. Hence the rule of liberal construction should be applied.

Shelton Electric Co. vs. Victor Talking Machine Co.
277 Fed. 433.*

*"At common law, the person injured by an illegal restraint in trade had a right of action. Standard Oil Co. vs. U. S. 221 U. S. 1, 49 to 64, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (New Series) 834, Ann. Cas. 1912D, 734; Western Union Tel. Co. vs. Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, and it is upon such unreasonable restraint that the second count of the complaint is predicated. The treble damages, which the complaint seeks to recover, are neither a penalty or a forfeiture, but merely treble damages allowed by the law for the redress of a private injury. Chattanooga Foundry Co. vs. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65 51 L. Ed. 241."

Chattanooga Foundry and Pipe Co. vs. Atlanta
203 U. S. 390, 51 L. ed. 241.*
Hicks vs. Bekins Moving and Storage Co.
87 F (2) 583.
Strout vs. U. S. Shoe Machinery Co.
195 F. 313.
Brady vs. Daly
175 U. S. 148, 44 L. ed. 109.
James-Dickinson Farm Mortgage Co. vs. Harry
273 U. S. 119, 71 L. ed. 569.

(a) Remedial statutes liberally construed.

It is well settled that a remedial statute is to be liberally construed in order to effectuate the purpose which Congress had in view in enacting it.

Farmers and Mech. Nat'l. Bank of Buffalo vs. Dearing
91 U. S. 29, 23 L. ed. 196.
Grand Trunk Railway Co. of Canada vs. Richardson
91 U. S. 454, 23 L. ed. 356.
Stewart vs. Kahn
78 U. S. 493, 20 L. ed. 176.
U. S. vs. Wiley,
78 U. S. 508, 20 L. ed. 211.

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*When this case was in the Circuit Court for the Eastern District of Tennessee, the court said:

"The great disproportion between these sums and the maximum limit of the fine imposed by Section 3 is a circumstance admitting of no rational explanation, if the damages recovered under Section 7 must be regarded as a penalty inflicted as punishment, like the fine imposed under Section 3. These and other characteristic points of difference between penal and remedial actions support the conclusion arrived at that these actions are remedial and compensatory only." (101 Fed. 900.)

Galveston, Houston, Henderson Railroad Co. vs. Cowdray
78 U. S. 459, 20 L. ed. 199.
Miller vs. Robertson
266 U. S. 243, 69 L. ed. 265.*

While the Anti-Trust Acts of the United States are penal as to certain of their provisions, this does not affect the liberal construction which should be given the remedial provisions of the same acts. So, in

Farmers and Mech. Nat'l Bank of Buffalo vs. Dearing, supra,

the court said:

"The 30th section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it. Gray vs. Bennett, 3 Met. 522, 529."

And, to the same effect see

Murphy vs. St. Louis-San Francisco R. Co.
226 S. W. 637, 205 Mo. App. 682.

3. The fallacy in the reasoning in the Cooper case.

(a) Remedial statutes include the sovereign although not named.

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*Mr. Justice Butler, speaking for the court, said:
"The purpose of Section 9 was to prevent or lessen losses and inconvenience liable to result to nonenemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered. U. S. vs. Anderson, 9 Wall. 56, 66, 19 L. ed. 788, 790. The just purpose of the section is not to be defeated by a narrow interpretation, or by unnecessarily restricting the meaning of the word within technical limitations. U. S. vs. Freeman, 3 How. 556, 565, 11 L. ed. 724, 728; Danciger vs. Cooley, 248 U. S. 319, 326, 63 L. ed. 266, 269, 39 Sup. Ct. Rep. 119; U. S. ex rel. French vs. Weeks, 259 U. S. 326, 328, 66 L. ed. 965, 969, 42 Sup. Ct. Rep. 505."

Bearing in mind the liberal construction which must be given statutes intended to be remedial in their effect, we now turn to a consideration of whether it was the Congressional intent that a State should be excluded by the use of the word "person" in Section 7 of the Sherman Act under which the appellant seeks to derive its right to maintain the present action. And since this Court in the Cooper case has held the United States not to be a "person" within the provisions of that section, it becomes necessary to examine that decision in an effort to see if the same reasoning should be applied to a case where a sovereign State brings the action.

It is respectfully submitted that in the beginning of its opinion in the Cooper case the court assumes an unsound premise in asserting "since, in common usage, the term 'person' does not include the sovereign, statutes employing that term are ordinarily construed to exclude it." In support of this statement the court cites.

In Re Fox
52 N. Y. 530,

and

United States vs. Fox
94 U. S. 315,
24 L. ed. 192.

The question presented in the Fox cases was the right of the United States to acquire by devise real property located in New York where the statute of that State provided that a testator might devise his lands "to every person capable by law of holding real estate, but no devise to a corporation shall be filed, unless such corporation be expressly author-

ized by its charter or by statute to take by devise." It was pointed out that the language of the statute was substantially adopted from the English Statute of Wills and became a part of the law of New York upon the adoption of the Constitution of 1777. At that time, of course, the term "person" could not have embraced the United States since the United States was not in existence. The New York Court said:

> "But no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a State or a nation. Its meaning may be extended by express definition so as to include a government or sovereign."

Thus it was not upon authority but rather upon lack of authority, or perhaps lack of diligence, that the State court held the word "person" did not embrace a government or sovereign. The United States Supreme Court, when the case was appealed, holding the several States possess the power to regulate the tenure of real property within their respective limits, simply followed the New York Court and cited no additional authority.

The authority which the New York Court failed to discover was fully discussed by Mr. Justice Fuller in writing the opinion for the court in the case of

Stanley vs. Schwalby
147 U. S. 508
37 L. ed. 259.

The question presented there was as to the right of the United States to take the benefit of a statute of limitations of the State of Texas which provided

that every suit to recover real estate "as against any person in peaceable and adverse possession thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards." The court said:

> "But, as observed by Mr. Justice Strong, delivering the opinion of the court in Dollar Savings Bank vs. United States, 86 U. S. 19 Wall. 227, 239 (22: 80, 82), while the king is not bound by any act of Parliament unless he be named therein by special and particular words, he may take the benefit of any particular act though not named. And, he adds, that the rule thus settled as to the British Crown is equally applicable to this government; and that so much of the royal prerogative as belonged to the king in his capacity of parens patriae or universal trustee, enters as much into our political state as it does into the principles of the British constitution. The general rule is stated in Chitty on the Law of the Prerogatives of the Crown, 382, clearly to be 'that though the king may avail himself of the provisions of any acts of Parliament, he is not bound by such as do not particularly and expressly mention him.' 'For it is agreed in all our books that the King shall take benefit of any act, although he be not named.' Coke 32a; 11 Coke, 68b; 1 Leon. 150; 1 Bl. Com. 262. . . . . It was in view of the ancient rule and its derivation that the Supreme Court of Wisconsin, in Baxter vs. State, 10 Wis. 454, held that while the statute cannot be set up as a defense to an action by the government, this rule being founded upon the public good and the protection and preservation of the public interest; instead of furnishing any support for the position that as a defendant the State could not

have the benefit of the statute, would fully sustain the opposite conclusion. And so, in People vs. Gilbert, 18 Johns. 227, it was pointed out by way of illustration that the same rule of construction applied to the statute concerning costs, which the State may recover, though not obliged to pay them because not included in the general terms of the statute. It is obvious that the ground of the exemption of governments from statutory bars or the consequences of laches has no existence in the instance of individuals, and we think the proposition cannot be maintained that because a government is not bound by statutes of limitation therefore the citizen cannot be bound as between himself and the government.

"Of course, the United States were not bound by the laws of the State, yet the word 'person' in the statute would include them as a body politic and corporate, Sayles, Art. 3140; Martin vs. State, 24 Tex. 68."

The rule announced by Mr. Justice Fuller is based upon sound precedent and sound reasoning. Its alternative, as pointed out in many cases, is to place the King or sovereign, the parens patriae, in a worse position than that of its humblest subject.

Typical of these cases is Pierce vs. U. S. of America 255 U. S. 398; 65 Law Edition 697, wherein Justice Brandeis answering the contention that the United States had no right under the Elkins Act to enforce a penalty by a creditors bill, said:

"To the contention that the statute has not made this process available for the Government in enforcing a penalty, it may be answered, as was done by the King's Bench a hundred years ago, in Rex vs. Woolf, 2 Barn. and ALB. 609,

611, 106 Eng. Reprint, 488, when it was insisted that a fine due to the Crown was not a judgment debt for which execution could be levied: '. . . mischievous consequences would ensue to the Crown and the regular administration of justice, from a delinquent withdrawing all his property from the effect of a judgment; and that the preventing that will not be a mischievous consequence to anyone but himself. Here there is a judgment that the defendant do pay to the King a fine of a certain sum. By that judgment a debt becomes a debt to the King, of record; and it is payable to the King instanter . . . . . if we were to say that the Crown shall not be at liberty to issue an immediate execution for its own debt, we should place the Crown in a worse situation than any subject.' "

It will be noticed that the common law rule was:

"The king shall take the benefit of any act, although he be not named."

So, the rule was not limited to a case where the sovereign sought to avail himself of a procedural statute applying a new procedure to a pre-existing substantive right, but the sovereign was given the benefit of a statute creating a new substantive right. This is borne out not only by the early English authorities in which the rule was announced and followed, but also by the modern application of the rule. Applying this rule we are able to reconcile many of the cases in which the United States or the State has or has not been held to be a person within the meaning of that word as used in a statute.

As early as the *Queen and Buckberds Case*, 1 Leon. 149, 74 Eng. Reprints, 138, Popham, the Attorney General, said:

"The Queen ought to recover damages, but only single damages, but not double damages; And the words of the statute are general, therefore the queen shall have the benefit of it, and of all statutes made for the benefit of the subjects, the King shall take advantage: the Statute of Gloucester gives damages in a writ of cosinage, Aiel and Besail, and the King brings an action upon the seisin of his ancestors, he shall recover damages, and in construction of statutes, the opinions of them which were next to the making of them is to be much respected: vide 19 E. 2, Rot. 90, 19 E. I Rot. 255, 231, 136. And always the King counts to his damage, etc. and that should be in vain, if he should not recover damages: . . . ."

In

Lord Berkley's Case (1561, Plow 223, 243, 75 Eng. Reprints, 339, 372, Weston, Justice said:

"But yet the King, though not named in statutes, shall take advantage of them as another shall do; as he shall take advantage of the Statute of Wast. and of the Statute of 9 R. 2. Cap. 3. of Error and Attaint for him in reversion upon recovery against their tenant for life, notwithstanding he is not named in them. So if the King as heir to his mother brings a sur cui in vita, the plea shall not be delayed for the nonage of the heir of the husband, but the King shall take advantage of the statute of Westminster 2 Cap. 40. notwithstanding he is not named. And on the other hand if he is not named in a statute he shall not be restrained by it."

In

The Case of a Fine

7 Coke, 32a; 77 Eng. Reprints, 459, the facts were as follows:

"The King was informed, that divers manors

and lands were entailed to Gilbert de Clare, Earl of Gloucester, and the King who now is, is heir of the body of the said Gilbert inheritable to the said lands; some of which manors the King and others his progenitors, for good consideration, had granted to divers subjects; all which grants (as was pretended) were in respect of the said ancient estate-tail utterly void. The King that now is, of grace and good will to his subject, and for their quiet and repose, required Popham Chief Justice, and Coke Attorney-General, to consider how by law he might establish the estate of the said patentees, and others claiming under them, against the said estate-tail."

Whereupon they severally agreed unanimously:

"Forasmuch as the King is bound (a) by the Stat. de Donis Conditionalibus, as it is adjudged in Lord Berkley's case, Plow. Com. 240. By which Act the King is restrained from alienation; for it is enacted by the said Act, quod finis ipso jure sit nullus; reason requires that the King shall take benefit of the Acts of 4 (b) H. 7, and 32(c) H. S. which enables tenant in tail to bar his issues: for it is agreed in all our books that the King shall take benefit of any Act, although he be not named, 12 (d) H. 7. 21 a. 35(e) H. 6. 60. The Lord Berkley's case, Plow. Com. 240. And it would be hard that the King, being issue in tail of a gift made to a subject, should be in worse condition than if he had not been King."

Magdalen College Case, (1615) 11 Co. Rep. 66b, 68b, 1 Bl. Com. 14th Ed., 77 Eng. Reprints 1235, 1238.

In

The Queen vs. Cruise, (1852) 2 Ir. Ch. Rep. 65;

it is said:

> "I apprehend that the Crown, although not bound by the enactment in the 31st section of the former, or the 21st section of the latter Act (the word 'person' not including the Crown), may take advantage of the Acts. The general rule clearly is that, 'though the King may avail himself of the provisions of any Act of Parliament, he is not bound by such as do not particularly and expressly mention him.' The cases are referred to in Chitty on Prerogatives, page 382."

And, also

> *Attorney-General vs. Tomline*, (1880) 15 L. R., Ch. D. 150.
> *Attorney General for New South Wales vs. Curator of Interstates Estates*, (1907) A. C. 519 (L. R.).

In the case of

> *Nardone vs. United States*
> 302 U. S. 379, 82 L. Ed. 314,

the principle was summarized thus:

> "That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong." Citing, U. S. vs. Knight, 14 Pet. 301, 315; 10 L. ed. 465, 472. U. S. vs. Herron, 20 Wall 251, 263; 22 L. ed. 275, 279. Black, Int. of Laws, 2nd Ed. 97.*

In

> *Tindal vs. Wesley*
> 167 U. S. 204, 42 L. ed. 137,

*While these cases announce the principle that the sovereign is bound by the general words of a statute intended to prevent injury and wrong, this exception to the general rule itself illustrates that the question of whether a sovereign is included within the general words of a statute depends primarily upon the public interest and benefit.

the Court, speaking through Mr. Justice Harlan, in holding that the judgment in that case would not conclude the State, said:

> "But this court said: 'Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of Carr vs. U. S., 98 U. S. 433, (25:209), already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. . . ."

In

United States vs. Jacinto Tin Company
125 U. S. 273; 31 L. ed. 747,

the Court, in holding that a suit may be brought by the United States to set aside, cancel or annul a patent for land issued in its name on the ground that it was obtained by fraud or mistake, said:

> "If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual, is hardly open to argument."

And again:

> "It cannot be conceived why the Government should stand on a different footing from any other proprietor."

And yet again:

> "But we are of the opinion that since the right of the Government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the Government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter."*

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*This contention was discussed in the dissenting opinion of Mr. Justice Black in the Cooper case which was concurred in by Mr. Justice Reed and Mr. Justice Douglas as follows: "And certainly it can hardly be denied that the language of the Act, giving all persons a right of action, should if liberally construed be held to justify suit by the United States. For, in Cotton vs. United States, 11 How. 229, 229, 231, 13 L. ed. 675, decided forty years before the Sherman Act was adopted, this court said in speaking of the United States: 'Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property. . . . . It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection.' And, speaking in similar vein in Helvering vs. Stockholm Enskilda Bank, 293 U. S. 84, 92, 55 S. Ct. 50, 53, 79 L. ed. 211, after having cited Blackstone for the proposition that the sovereign is a 'corporation,' and after having gone even beyond this to hold that the statutory word 'resident' included the United States, the court said: 'This may be in the nature of a legal fiction; but legal fictions have an appropriate place in the administration of the law when they are required by the demands of convenience and justice'."

The principle announced in the foregoing cases cannot be dismissed from consideration, as the majority opinion seeks to do, by the assertion that while the United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights, the Sherman Act created new rights and remedies which are available only to those on whom they are conferred by the Act. The rules are not inconsistent and both may be applied. An action by the sovereign under Sec. 7 is one in vindication of its property rights. The rule affording the sovereign the benefit of any act does not except acts creating new rights and remedies. The cases cited by the court were not cases in which public rights, or the rights of the sovereign were involved. But even if it be considered that both rules cannot consistently be applied to the same statute, and that the application of one must exclude the other, the determining factor is pointed out in the case of

Wilder Mfg. Co. vs. Corn Products Ref. Co.
236 U. S. 165, 59 L. ed. 520,

as follows:

> "In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statutes, but the remedies which it provided, were coextensive with such conceptions."

If the United States which possesses only the attributes of sovereignty surrendered to it by the states,

is entitled to the benefit of a remedial statute, although not expressly named therein, reason dictates that the sovereign state, which possesses all of the attributes of sovereignty not so surrendered, presents a much stronger claim to this prerogative of the sovereign in the absence of a specific showing that the state was expressly excluded under the terms of the statute.

The sovereign prerogative of the crown devolved, in America, upon the states.

Fontain vs. Ravenel
17 How. 369, 15 L. Ed. 80.
Wheeler vs. Smith
9 How. 55, 13 L. Ed. 44.

In

State of Wyoming vs. U. S.
255 U. S. 489, 65 L. Ed. 742

the Supreme Court accorded to the State of Wyoming the protection of the Fifth Amendment of the United States Constitution, holding that the vesting of land in a state by a lieu selection under an act of Congress prohibited a subsequent executive withdrawal.*

(b) In Re *Fox against Weight of authority.*

The decision in In Re Fox, supra, is opposed to the great weight of authority as found in the de-

*The applicable language of the Fifth Amendment is: "'. . . nor shall any person be subject, for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'"

cisions of this court and many state courts insofar as the rights of a sovereign are involved under a remedial statute, or a statute conferring rights upon "person."

In

State Highway and Public Works Commission vs. Cobb
2 S. E. 2nd 656, 215 N. C. 556,

the Supreme Court of North Carolina said:

> "The state constitutes a sort of intangible sovereignty. Legally speaking, it cannot be assaulted, slandered, or injured as an individual with respect to a personality that it does not possess. But it does own property and has property rights which might be the subject of invasion. If a wrong is committed against it in the nature of a tort, it must be with respect to such a right."

In

State vs. Dunniway
128 Pac. 853, 63 Ore. 555,

the Supreme Court of Oregon in holding that a state could maintain an action in ejectment under the statutes of that state said:

> "That section of the Code is broad enough to include the state. The words 'any person,' specifying who may bring the action, were intended and are broad enough to include artificial as well as natural persons. Endlich on Interpretation of Statutes, Sections 87, 89; Chapman vs. Brewer, 43 Neb. 890, 898, 62 N. W. 320, 47 Am. St. Rep. 779; State v. Woram et al., 6 Hill, 33, 38, 40 Am Dec. 378; People v. Utica Ins. Company, 15 Johns. 358, 8 Am. Dec. 243."

In

Vestal vs. Pickering
267 Pac. 821, 125 Ore. 553,

The Supreme Court of Oregon said:

"It cannot be questioned that the State is competent to become the beneficiary of a last will and testament unless there is a statute prohibiting the State to exercise that power. There is no statute prohibiting this State from receiving property by will. It has been held that the United States Government, which is a government of limited power, is capable of receiving property by will unless prohibited by statute. Compare Dixon vs. U. S., 125 Mass. 311; 28 Am. Rep. 230, with U. S. vs. Fox, 94 U. S. 315, 24 L. ed. 192, affirming In Re Fox, 52 N. Y. 530, 11 Am. Rep. 751."

In the same connection, see

In Re Edges Estate
14 Atl. 2d. 293; 339 Pa. 67
Lenjerr vs. Feldman
202 Pac. 624; 110 Kan. 115.*

In the case of

Kansas vs. Herold
9 Kan. 194;

The Supreme Court of Kansas held:

"The United States is a 'person' within the meaning of Section 1 of the 'Act to prevent certain trespasses,' which makes it an offense for any person to cut down, injure or destroy, or take or remove any trees, timber, rails or wood,

*The statute of wills of Kansas provides for a devise to "any person." Compare this case with In Re Fox, supra.

'standing, being or growing on the land of any other person.' etc."

In the case of

Martin vs. The State
24 Texas 61,

The Supreme Court of Texas said:

"It is contended, that the offense charged in this indictment, is not embraced within the provisions of the 33rd section of the Act of the 20th of March, 1848, because that section punishes the false making, or fraudulent alteration of a public record, only when it is done 'with intent that any person may be defrauded.' It is said, that the section does not reach the case of a fraudulent alteration, or false making of a public record 'with intent to defraud the State;' but we think the State must be taken to be a 'person,' within the meaning of the statute."

It should be pointed out here that in the two cases last cited the courts were construing criminal statutes, which under the well settled rules of construction, must be strictly construed.

In

State of Indiana vs. Woram
6 Hill 33, 40 Am. Decisions 378,

the New York Court said:

"Our statute is, that 'all notes in writing made and signed by any person, whereby he shall promise to pay to any other person, or his order,' etc., shall be negotiable, etc.; and that 'the word "person" in the last two preceding sections shall be construed to extend to every corporation capable by law of making contracts: '1 R. S. 768, Section 1-3. It did not require the aid of the

legislature to prove that the word person in a statute may extend to a corporation as well as to a natural person: The People vs. Utica Ins. Co. 15 Johns, 358 (8 Am. Dec. 243). That a state is a corporation can not be doubted. It is a legal being, capable of transacting some kinds of business like a natural person, and such a being is a corporation. The People vs. Assessors of Watertown, 1 Hill, 620. I see no reason for doubt that a state may be the payee of a promissory note."

In

State vs: Odd Fellows Hall Association
243 N. W. 616, 123 Neb. 440,

the Supreme Court of Nebraska in holding that a state was included within the language of a statute of that state relating to the appeal of "any person," said:

"This is but a legislative recognition of the general rule that 'a state . . . may be regarded as a person in law, and as such may be recognized by the courts as a party plaintiff.' 47 C. J. 19.

" 'It (a state) is an artificial person. It has its affairs and its interests: it has its rules: it has its rights: and it has its obligations. It may acquire property, distinct from that of its members.' Chisholm vs. Georgia, 2 Dall. 419, 455, 1 L. ed. 440. So, in the sense of the defined terms of our revenue act, 'state' is not only embraced in the term 'person' as implied therein, but is likewise within the term of the descriptive language, 'any other entity [a real being, whether in thought (as an ideal conception)

or in fact. Webster's New Int. Dic.] that may be the owner of property."

In

State vs. General American Life Ins. Company 272 N. W. 555, 132 Neb. 520,

it appeared that the Nebraska statute provided that "any person" may have any legal question determined under the uniform declaratory judgment act. The court pointed out that the act was remedial and therefore was to be liberally construed and administered. It held that the word "person" as used in the declaratory judgment act included the State so as to authorize the State on relation of the State Insurance Director to maintain an action for a declaratory judgment. See also,

Longview Company vs. Cowlitz County
95 Pac. 2nd 376; 1 Wash. (2) 64.

Buffalo vs. Beppinger
76 N. Y. 393;

Buffalo Cement Company vs. McNaughton
156 N. Y. 702, 51 N. E. 1089, 35 N. Y. Sup. 453.

(c) Use of a word in one portion of an act does not necessarily fix its meaning when used in another portion.

If the ruling announced in the foregoing cases be correct; that is, that Section 7 of the Sherman Act is a remedial provision; that a remedial provision in a statute must be liberally construed in order to effectuate its purpose; and that the soverign is entitled to participate in the benefit of remedial stat-

utes although not specifically named therein, then much of the reasoning of the majority opinion in the Cooper case breaks down. The word "person" construed in its ordinary and natural sense in a statute granting a remedy to "any person" would include the sovereign. So the logical approach to the question of whether the state is included in the language of an act giving all persons a right of action is to determine whether there is any evidence of an intent on the part of Congress to exclude the State.

Davis vs. Pringle
268 U. S. 315, 69 L. ed. 974.

See also the dissenting opinion in the Cooper case.*

It should require strong evidence of such congressional intent to change or create an exception to this well established principle of law. No such evidence is presented in the majority opinion in the Cooper case as applicable to a state. But where the word "person" is used in the penal provisions of a statute, its ordinary and natural sense would not include the sovereign. So the word "person" may be used with different meanings in the same statute and the use of the word in one portion without extension or qualification does not necessarily fix its meaning when used in another portion of the same act.

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*"These particular cases are but facets of a general rule that has long been accepted—the United States can exercise all of the legal remedies which other persons, bodies or associations can exercise, both at common law and under statutes, unless there is something in a statute or in its history to indicate an intent to deprive the United States of that right."

Atlantic Cleaners and Dyers vs. United States 286 U. S. 427, 76 L. ed. 1204.*
Lamar vs. United States
240 U. S. 60, 60 L. ed. 526;
People of Porta Rica vs. Costillo
227 U. S. 270, 57 L. ed. 507.

We cannot assume then as does the majority opinion, that the word "person" as used in the penal provisions of the anti-trust law should bear the same construction as it does when used in the remedial provisions. Where the court points to other provisions of the Sherman and Clayton Acts in which the word "person" is used in a sense which would not include the United States, it fails to point to that portion of the Clayton Act providing injunctive relief for "any person, firm, corporation, or association . . ." which reads:

"Provided, that nothing herein contained shall be construed to entitle any person, firm, corpora-

*"Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute, or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same Act are intended to have the same meaning. Courtauld vs. Leth, L. R. 4 Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act, with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed and of the circumstances under which the language was employed."

> tion, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier . . ."

Certainly, if it was necessary to use the language "except the United States" in order to remove the United States from the purview of its classification as a "person, firm or corporation," it is self evident that in certain portions of the Act the term "person" was used in a broad and inclusive sense—embracing the sovereign unless specifically excluded.

(d.) The policy of the act was not to exclude the State from any remedy.

Where the court pointed out in the Cooper case that it considered the policy of the act to give "two classes of actions,—those made available only to the Government, which are provided in detail, and, in addition, a right of action for treble damages granted to redress private injury," we are forced to inquire if it was the policy of the act to discriminate against the states, one of the largest class of purchasers, and to eliminate them from any remedy whatsoever. As to the United States, the argument is forcibly answered in note 3 of the dissenting opinion. But the state is nowhere specifically mentioned in the act. If the construction adopted by the majority opinion be correct, and if it be extended to apply to the State, the State has no remedy by criminal prosecution; it has no remedy by injunction; it has no remedy by civil action to redress its injury; it has no remedy whatsoever. It is subject to injury by wrongdoers and to repeated injury without redress. Could this have been the policy of Congress in adopting the anti-trust legislation? Could Congress have intended

its legislation to be interpreted in a way that would produce an unreasonable or unjust result?

U. S. vs. American Trucking Associations
310 U. S. 534, 542, 543, 84 L. ed. 1345;
Sorrells vs. U. S.
287 U. S. 435, 446, 77 L. ed. 413.

(e) Criticism of the other sources looked to by the Court as an aid to construction.

Where the majority opinion cites other acts which impose penalties upon "persons;" which use the word in a provision of an act which, like Section 7 of the Sherman Act, authorizes a civil action for the recovery of treble damages; or which use the word "person" in a situation clearly not applicable to the sovereignty, the argument becomes strained and almost specious. The sovereignty can not be divested of its rights without a clearly expressed intention, and the application of a penalty to the sovereign will not be presumed; a word cannot be defined by the use of the same word; language used in a connection which it would be unreasonable to apply to the sovereign should not be so applied. Thus Section 77 of the Wilson Tariff Act uses the exact words of Section 7 of the Sherman Act and is not persuasive, therefore, in support of the argument of the majority opinion. The same is true with the Revenue Act of 1916, although it might also be observed in this connection that it is difficult to see how the United States could be damaged in its business or property by a violation of the terms of that act. And where the majority opinion cites the provision of the Clayton Act which provides for the stopping of the running of the statute of limitation in respect to each

and every private right of action, we can logically assume (which the majority justices seem to have overlooked) that Congress recognized the rule long since established by this Court that statutes of limitation do not run against the sovereign and therefore legislation was not necessary to stop the statute with reference to a right of action vested in the sovereignty.

The "considerable body of judicial expression to the effect that Section 7 authorizes an action for damages only by private suitors" bears no weight since, as pointed out by the court, "none of the cases presented the exact question here involved."

Where the majority opinion points out that Senator Hoar rewrote most of the original act, eliminating Section I with its provision for civil suits by the United States, may we not conclude that Senator Hoar was familiar with the rule announced in the cases hereinbefore cited which would include the State and even the United States within the designation "person" when used in a remedial statute. As pointed out by Judge Clarke of the Circuit Court in the dissenting opinion in U. S. vs. Cooper Corporation, 114 Federal 2d 414,

> "The exhaustive study of contemporary congressional debates relied on by the court below, D. C. S. C. N. Y. 31 F. Sup. 848, 851, and offered to us here appears inconclusive; neither Senator Sherman, who presented a first draft, nor Senator Hoar, who drafted the final act, appear to have given public consideration to the matter here involved. 35 Ill. L. Review, 223."

Certainly, public consideration was never given to

the right of a State to institute civil action for treble damages.

Argument that previous Attorney Generals had failed to bring a civil action for treble damages on behalf of the United States is not more conclusive than an argument that one Attorney General did institute such an action, unless it be shown that each of the previous Attorney Generals who failed to act were cognizant of cases in which a violation of the anti-trust laws had operated to the injury of the business or property of the United States. Unless there be shown specific instances where a state has been injured by a violation of the anti-trust laws, and many such instances, the failure of any state to institute such an action bears no weight in construing an Act of Congress. Nor could the administrative interpretation of any state have any weight in construing congressional statutes.

Where the statute defines "person" as including "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country" it must be remembered that these are words of inclusion, not exclusion. Since the statute is penal in part, and since it had not been conclusively adjudicated at the time of its passage that a corporation was a person,* words of inclusion were necessary in order to avoid a too strict construction of its penal provisions. But since the statute is also remedial in part and that part is to be liberally construed, words of positive exclusion were essential had Congress intended to

*This question is discussed in 35 Ill. L. Review 223.

exclude the State or the United States from participating in its benefits.

II.

If the word "person" as used in the statute excludes the sovereign, the State may yet maintain an action.

The foregoing discussion has been for the primary purpose of showing that the phrase "any person" as used in the provisions of the anti-trust laws affording a right of action for treble damages is broad enough to include the state as a sovereign. However, whether that phrase be so construed or whether it be limited to private rights of action, the State would be entitled to maintain the action. The State of Georgia has effectively divested itself of its sovereignty with reference to that phase of interstate commerce dealt with in the anti-trust legislation and is relegated to the status of a private individual.

A state may divest itself of its sovereignty in vairous ways. For the purpose of this discussion, however, it will be sufficient to deal with the accomplishment of that result by complainant by its entering into compacts with other states, and by assuming to act in a proprietary capacity under its own legislation.

1. The sovereignty of the State no longer exists with reference to the U. S. Anti-Trust Acts because they apply only to interstate commerce.

The State of Georgia has entered into a compact with other states of the Union by which it has divested itself of its sovereignty with regard to certain

powers and surrendered those powers to the United States.

Chisholm vs. Georgia
2 Dall. 419, 1 L. ed. 440.*
Tennessee vs. Davis
100 U. S. 257, 25 L. ed. 648.**
Cohen's vs. Virginia
6 Wheat. 264, 5 L. ed. 257.

The right of the State of Georgia to withdraw from the compact into which it entered was settled as early as 1865. See

Texas vs. White
74 U. S. 700, 19 L. ed. 227.

By Article 1, Section 8 of the Constitution of the United States, Congress is given power "to regulate commerce with foreign nations, and among the sev-

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**"The United States are sovereign as to all the powers of government actually surrendered." Again, "When sovereigns are sued in their own courts, such a method may have been established as the most respectful form of demand; but we are not now in a State court; and if sovereignty be an exemption from suit in any other than the sovereign's own court, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."

*"But when the National Government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered, the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. The judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State."

eral states, and with the Indian tribes." In prescribing the rules and regulations to govern interstate commerce, Congress is supreme.

Addyston Pipe and Steel Co. vs. United States 175 U. S. 211, 44 L. ed. 136;
Northern Securities Co. vs. United States 193 U. S. 197, 48 L. ed. 679.

No state may in anywise enact legislation which in any way controls, regulates or infringes on interstate commerce.

Northern Securities Co. vs. United States, supra.
Southern Railway Co. vs. King 217 U. S. 524, 54 L. ed. 368.*
West vs. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716;
United States vs. International Harvester Co. 214 Fed. 987.

Since Congress has dealt with that feature of interstate commerce regulated under the anti-trust acts, no state statute can authorize the performance of an act that the anti-trust acts forbid. Within the scope of those acts, they are supreme.

United States vs. Reading Company 226 Fed. 229.**

*"It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The states cannot pass any law directly regulating such commerce. Attempts to do so have been declared unconstitutional in many instances, and the exclusive power in Congress to regulate such commerce uniformly maintained."

**"The Federal law is supreme in the field of interstate and foreign commerce and the law of a state cannot authorize its citizens, either individual or corporate, to violate a constitutional act of Congress."

Affirmed 253 U. S. 26
40 Sup. Ct. 425.

Citing

Philadelphia B. & W. Oil Co. vs. Shubert
220 Sup. Ct. 589, 56 L. ed. 911.

See also

United States vs. Hall
248 U. S. 420, 63 L. ed. 337;
Truax vs. Corrigan
257 U. S. 312, 66 L. ed. 254.

But, although the State has divested itself of its sovereignty with reference to the power to control or regulate interstate commerce, and especially with reference to that portion of interstate commerce regulated under the anti-trust acts, the State still has the capacity of a "person" to be injured in its business or its property by a person who violates the anti-trust laws. As stated in the Chisholm case, supra,

> "By a state I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: it has its rules: it has its rights: and it has its obligations. It may acquire property distinct from that of its members . . . if one free man, an original sovereign, may do all this, why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished, the dignity of all jointly must be unimpaired."

The Constitution of the United States acts upon the States in their corporate capacity as well as upon individuals.

Martin vs. Hunters Lessee
1 Wheat. 304, 4 L. ed. 97, 107.

The States, while bound by the Constitution of the United States are also protected by it.

The State of Wyoming vs. United States, supra.
Pennsylvania vs. West Virginia
262 U. S. 553, 67 L. ed. 1117.*

In

Tirrell vs. Johnston
171 Atl. 641; 86 N. H. 530,

affirmed by the Supreme Court of the United States in 293 U. S. 533, the Supreme Court of New Hampshire, in holding a federal rural mail carrier furnishing his own automobile liable for the gasoline road toll imposed for the general use of state roads, said:

> "To put it in everyday phrase, it is a claim that the general government should pay for what it wishes to buy or use. Vast as the powers of the general government are, they do not include a right to confiscate where there is no offense. It cannot appropriate the property of a state, any more than it can quarter soldiers upon the individual citizen in times of peace.

*"By the Constitution, Article I, Section VIII, Clause III, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it."

"These conclusions do not depend upon any theory of state sovereignty. They result from a denial of national absolutism. They are not maintained upon a plea that a state is clothed with rights or endowed with powers peculiar to itself. That feature of our dual form of government is put aside. That a state is an entity, entitled to the fundamental rights, privileges, and immunities belonging to every legally recognized entity, is all that is here claimed. Nothing is demanded on behalf of the states which would not be granted without question at the behest of the humblest citizen."

If there be any distinction between the protection afforded to States and to individuals under the Constitution and laws of the United States in cases where the States have ceded their sovereignty to the United States, that distinction is only to afford greater protection to the State as a quasi sovereign than to an individual and to allow the State to sue in its capacity of quasi sovereign in some instances when specific relief would not be accorded to a private party. So, in

Georgia vs. Tennessee Copper Company
206 U. S. 230, 51 L. ed. 1038,

it was said:

"When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interest; and the alternative to force is a suit in this court. Missouri vs. Ill., 180 U. S. 208, 241, 45 L. ed. 497, 512, 21 Sup. Ct. Rep. 331.

"Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped."

Of course it must appear that the State has suffered a wrong furnishing a ground for judicial redress or is asserting a right susceptible of judicial enforcement.

Florida vs. Mellon
273 U. S. 12, 71 L. ed. 511.

However, at common law, the person injured by an illegal restraint in trade had a right of action.

Shelton Electric Co. vs. Victor Talking Machine Co., supra.

It may well be inquired whether the State in ceding to the United States full power and control over interstate commerce, agreed to submit to an injury to its property or business resulting from a monopoly or combination in restraint of such commerce and trade and to be required to relinquish its right to redress arising from such injury. In such cases, the State as trustee for its citizens is somewhat more certainly entitled to specific relief than a private party might be and to all of the remedies afforded to an individual.

2. The State of Georgia has assumed the status of an individual by its own actions.

A State may specifically divest itself of its sovereignty by its own legislation under which it assumes to act in a proprietary capacity.

Bank of the United States vs. Planters Bank of Georgia, 9 Wheat. 904, 6 L. ed. 244;
Davis vs. Gray
83 U. S. 203, 21 L. ed. 447;
Murray vs. City Council of Charleston
96 U. S. 432, 24 L. ed. 760;
Hall vs. Wisconsin
103 U. S. 5, 26 L. ed. 302.

The State of Georgia has not only given up its sovereignty with respect to that part of interstate commerce regulated by the anti-trust laws through entering into a compact with other states, but it has also, by statutory enactment, assumed the status of a private individual in bringing suit "with the same rights as any citizen" for debts due the State, including the recovery of that amount of which it has been defrauded. See Section 91-405 of the Georgia Code of 1933.*

Alexander vs. The State of Georgia
56 Ga. 479.**

Thus the State has done everything in its power to assume the status of a private individual. It has

*"Whenever the Governor, after consulting with the Attorney-General, shall deem it proper to institute a suit for the recovery of a debt due the State or money or property belonging to the State, he is authorized and required to institute such suit in the proper court of this State, with the same rights as any citizen, and to require the aid of the Attorney General to begin and carry on such suits."

**"The Governor has authority to institute suit for the recovery of money of which the State has been defrauded, under the general power granted to him of supervising the property of the State."

divested itself of its sovereignty. It has retained the right to make contracts, to trade, to purchase commodities shipped in interstate commerce. It has the capacity to be injured by persons violating the anti-trust laws. It has authorized the Governor to institute suit for the recovery of a debt due the State or money or property belonging to the State. Under the general power granted the Governor of supervising the property of the State the Supreme Court of Georgia has held that he, like any private citizen, can institute suit in cases where the State has been defrauded of its property. This statutory enactment of the General Assembly and judicial construction of the Supreme Court of Georgia should bear great weight in a determination of whether the State of Georgia has assumed the status of a private individual with respect to its right to recover under the remedial provisions of the anti-trust laws.

3. When a State has divested itself of its sovereignty it must bear the burdens of individuals and is entitled to their remedies.

It is long since settled that where an Act of Congress imposes a burden upon a "person," a State may so assume the status of an individual person by its own action as to be liable to the imposition of that burden, even though the sovereign would not ordinarily be bound.

In

Commonwealth of Pennsylvania vs. Fix
9 Fed. Supp. 272,

it was held that a state engaged in the sale of alcoholic, spirituous, vinous, fermented and other liquors for beverage purposes, was a "person" within the

Federal Liquor Taxing Act imposing an excise tax upon every "person" therein described, and providing that "person" should also include a partnership, association, company, or corporation. The court said:

> "When a state engages in private business, it divests itself, so far as its transactions in that private business are concerned, of its sovereign character, and takes that of a private citizen. Instead of communicating to that private business its privileges and prerogatives, it descends to the level of a private citizen. As to the transactions in such private business, it cannot claim the privileges or immunities of a sovereign."

In

State of Ohio vs. Helvering
292 U. S. 360, 78 L. ed. 1307,

it was held that a State is embraced within the meaning of the term "person" as used in a statute imposing an excise tax on persons selling liquor and providing that "where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person' as used in this title shall be construed to mean and include a partnership, association, company or corporation, as well as a natural." See also

South Carolina vs. United States
199 U. S. 437, 50 L. ed. 261.
United States of America vs. State of California, 297 U. S. 175, 80 L. ed. 567.

In

Allen vs. Regents of the University System of Georgia, 304 U. S. 439, 82 L. ed. 1448,

the Court had under consideration a United States statute which imposed a tax upon the amount paid

for admission in certain instances and which required the person receiving payment for admissions to collect the tax and make returns, to keep records and render statements under oath, and fix penalties for failure to collect or pay over the same. In that case, the court assumed that the burden of collecting the tax was imposed immediately upon the State agency and that the tax was imposed directly on the State activity. It held that where the State had embarked in a business which would normally be taxable, the fact that in so doing it was exercising its governmental power, did not render the activity immune from Federal taxation and that the immunity of State agencies from Federal taxation enjoyed from the dual sovereignty recognized by the Constitution did not extend to business enterprises conducted by the State for gain. Thus, again the Supreme Court placed the State in the category of a private individual and within the meaning of the word "person" as that word was used in an Act of Congress even though the result was to impose a liability upon the State. See also,

Helvering vs. Powers
293 U. S. 214, 79 L. ed. 291.

In

Republic of Honduras vs. Soto
19 N. E. 845, 112 N. Y. 310.

the Court of Appeals of New York held that the Republic of Honduras was a "person" within the meaning of the Code of Civil Procedure of that state providing that a plaintiff who is "a person residing without the state" or "a foreign corporation" could be required to give security for costs. In that case the court said:

"The word 'person' was, we think, used in its enlarged sense as comprising all legal entities except foreign corporations, which were authorized to bring actions in this State. In that sense it embraces moral persons having legal rights, capable of entering into contracts, and incurring obligations, as well as natural persons. The statutes must be construed with reference to the objects it had in view, the evils intended to be remedied, and the benefits expected to be derived from it; and, as thus construed, we can see no reason why the plaintiff is not included within the description of persons intended to be subjected to the obligations of the statute."

Where the sovereign has divested itself of its sovereignty and has assumed the status of a private individual, thus becoming subject to laws imposing burdens or liabilities, there is no logical reason why it should not also be entitled to participate in the rights and remedies accorded private individuals. Every consideration of reason and justice would make it so. The State should not be discriminated against and denied that which is granted its humblest citizen. Upon a contrary holding, the decisions of the Supreme Court according the State the protection of the Constitution become but empty verbiage. Firmly established by the decisions of this court is the principle that when the sovereign suffers an injury analogous to that suffered by one of its subjects it has an analogous remedy, or a right to elect to avail itself of the same remedy afforded the subject. Texas vs. White, supra; Florida vs. Anderson, 91 U. S. 667; 23 L. ed. 290; Alabama vs. Burr, 115 U. S. 413; 29 L. ed. 435. For a concise summary of these cases see Wisconsin vs. Pelican Ins. Co. 127 U. S. 265; 32 L. ed. 239.

CONCLUSION

In the final analysis, the question presented for determination is whether Congress intended the State to be excluded from the meaning of the word "person" as used in Section 7 of the Sherman Act. While the cases cited and the rules which they announce are but sign-posts intended to aid the court in arriving at the proper solution to this question, they have met the test of generations of judicial examination, and all point to one inescapable conclusion: that the State is authorized to recover under Section 7 of the Act.

If the remedy provided by the act is coextensive with the broad conception of public policy upon which it was founded to prevent harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, then no more appropriate case can be discovered than the instant one for the application of that salutary principle announced so long ago by the Court in the Magdalen College case, supra, that "The law will never make an interpretation to advance a private and to destroy the public, but always to advance the public, and to prevent every private, which is odious in law in such cases. And therefore it is well said in Heydon's case, in the Third Part of my report, f. 7 b. The office of Judges is always to make such construction as to suppress the mischief, and advance the remedy; and to suppress subtle inventions and evasions for the continuance of the mischief, et pro privato commodo. and to add force and life to the cure and remedy according to the true intention of the makers of the act pro bono publico."

Reliable statistics show that the total cost payments for the operation of the State Governments during 1938 exceeded $4,000,000,000, and that of Georgia alone was $61,145,000.* Much of this amount was used to purchase enormous quantities of commodities, such as asphalt for the paving of roads which is involved in this suit, moving in interstate commerce. The State is trustee for the members of the public, from whom its revenue is derived, and an injury or damage to its property is an injury or damage to every taxpayer. Bearing these things in mind can it with reason be said that the Sherman Anti-Trust Act discloses any intent of Congress to deprive these trustees and their beneficiaries of any redress, or the same redress which would be readily afforded to the humblest subject of the State suffering injury to his property as the result of a monopoly? Did Congress intend their Act to be so construed as to violate the following well settled rules of construction: a remedial statute is to be liberally construed to effectuate its purpose; the sovereign may take the benefit of any remedial statute although not specifically named therein; a statute should not be interpreted so as to produce an unreasonable or unjust result? Obviously not.

It would be an injustice to Congress itself, to construe a public act of that body as intending to leave the State remediless against the very activities which were prohibited by the terms of the enactment; especially so when there is no express language requiring such a construction. To deny to the State

*Figures prepared by C. E. Rightor, Chief Statistician, Division of State and Local Government, U. S. Bureau of Census.

the remedy which is granted to its humblest citizen and thus to leave the State at the complete mercy of wrong-doers is, in truth, a construction which lends force and life to the mischief and suppresses the cure and remedy; one pro privato commodo and not pro bono publico.

Of such vast importance is the question now before the court that the Attorneys General of thirty-four States, namely: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, filed briefs amici curiae in support of the petition for certiorari when it was presented by appellants; and, together with the State of Georgia, most urgently insist that this court should not so construe Section 7 of the Anti-Trust Act as to exclude the appellant and other States from its remedial provisions. The judgment of the Circuit Court should be reversed.

Respectfully submitted,

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